360

SUPREME COURT OF THE UNITED STATES.

No. 84.

SAMUEL SWARTWOUT, (U. S.) PLAINTIFF IN ERROR,

vs.

KNOWLES TAYLOR AND AL.

IN ERROR TO THE CIRCUIT COURT U. S. SOUTHERN DIST. OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	2
Citation and service	3	2
Clerk's certificate	4	3
Declaration	5	3
Issue joined	9	5
Judgment	10	6
Bill of exceptions	11	6

J. & G. S. GIDEON, Printers.

UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Knowles Taylor, Jonathan Little, and Samuel Taylor, plaintiffs, and Samuel Swartwout, defendant, a manifest error hath happened, to the great damage of the said Samuel Swartwout, defendant, as by his complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this second Monday of January, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-sixth.

J. W. METCALF, *Clerk.*

Clerk of the Circuit Court of the United States for the Southern District of New York, in the second circuit.

The answer of the honorable Smith Thompson and Samuel R. Betts, judges of the circuit court of the United States for the southern district of New York, in the second circuit, to the within writ, containing the citation, record, and other proceedings in the within cause.

Attest: JAS. W. METCALF, *Clerk.*

[L. S.] By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Knowles Taylor, Jonathan Little, and Samuel Taylor.

Whereas, Samuel Swartwout lately issued out of the Supreme Court of the United States, at the city of Washington, District of Columbia, a writ of error, directed to the judges of the circuit court

of the United States for the southern district of New York, second circuit, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judges thereof, between Knowles Taylor, Jonathan Little, and Samuel Taylor, plaintiffs, and Samuel Swartwout, defendant, a manifest error hath happened, to the great damage of the said defendant; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held in the District of Columbia, at the city of Washington, on the second Monday of January next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of January next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the second district of New York, in the second circuit, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-seventh.

SAM. R. BETTS.

I admit due service of the foregoing citation.

F. R. TILLON,
Attorney for Def't in error.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, James W. Metcalf, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, second circuit, this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the said United States the sixty-seventh.

J. W. METCALF, *Clerk.*

Circuit court of the United States for southern district of New York.

Pleas in the circuit court of the United States for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on the twenty-second day of November, one thousand eight hundred and forty-two. Witness: Smith Thompson, esquire, circuit judge; James W. Metcalf, clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the seventeenth day of September, as yet of April term, in the year one thousand eight

hundred and forty-two, the President of the United States sent his writ close of certiorari to the superior court of the city of New York, commanding the said superior court to certify to the said circuit certain pleadings and proceedings there remaining of record in the said superior court, in a certain suit wherein Knowles Taylor, Jonathan Little, and *Lemuel* Taylor, are plaintiffs, and Samuel Swartwout is defendant; for that the said Samuel Swartwout was sued therein for acts done by him as collector of the customs of the port of New York; which said pleadings and proceedings were returned to us in these words, to wit:

CITY AND COUNTY OF NEW YORK, *ss:*

Knowles Taylor, Jonathan Little, and Samuel Taylor, plaintiffs in this suit, by Francis R. Tillon, their attorney, complain of Samuel Swartwout, defendant in this suit, being in custody, &c., in a plea of trespass on the case upon promises. For that whereas, the said plaintiffs, at the several days and times hereinafter mentioned, were persons transacting business at the city of New York, under the name, firm, and style of Taylor, Little & Co.; and also, for that whereas, the said defendant, on the first day of June, in the year one thousand eight hundred and forty-two, at the city of New York, was indebted to the said plaintiffs in the sum of twenty thousand dollars lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant; and being so indebted, the the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of twenty thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiffs, to and for the use of the said defendant, and at the like special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of twenty thousand dollars, like lawful money as aforesaid, for money before that time had and received by the said defendant to and for the use of the said plaintiffs; and being

so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of twenty thousand dollars, like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested: Nevertheless, the said defendant (although often requested, &c.) hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, the said defendant hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiffs of twenty thousand dollars; and thereof the said plaintiffs bring suit, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Knowles Taylor, Jonathan Little, and Samuel Taylor, put in their place Francis R. Tillon, their attorney, against Samuel Swartwout, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Samuel Swartwout puts in his place Ogden Hoffman, at the suit of Knowles Taylor, Jonathan Little, and Samuel Taylor, in a plea of trespass on the case upon promises.

And the said Samuel Swartwout, defendant in this suit, by Ogden Hoffman, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant. And of this he puts himself upon the country, and the said plaintiffs likewise, &c.

Therefore the issue above joined is ordered, by the said circuit court of the United States for the southern district of New York, in the second circuit, to be tried at the circuit to be held at the City Hall, in the city of New York, in the said southern district of New

York, on the last Monday of November, one thousand eight hundred and forty-two.

At which day, before the judges of the said court, came as well the within named plaintiffs as the within named defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also came; who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the said defendant did undertake and promise in manner and form as the said plaintiffs have within complained against him, and they assess the damages of the said plaintiffs, on occasion of the promises, besides their costs and charges by them about their suit in this behalf expended, to fourteen thousand seven hundred and fourteen dollars and thirty-one cents, and for those costs and charges to six cents.

Therefore it is considered, that the said plaintiffs do recover against the said defendant *his* said damages, costs, and charges, by the jurors aforesaid, in form aforesaid *in form aforesaid* assessed, and also ninety-one dollars and forty-nine cents for their said costs and charges by the said court now here adjudged of increase to the said plaintiffs, and with their assent; which said damages, costs, and charges, in the whole, amount to fourteen thousand eight hundred and five dollars and eighty-six cents; and the said defendant in mercy, &c.

Judgment signed this day of December, 1842.

J. W. METCALF, *Clerk.*

$14,714	31
	6
91	49
14,805	86

Circuit court of the United States for the southern district of New York, in the second circuit.

SAMUEL SWARTWOUT, *ads.*
KNOWLES TAYLOR, JONATHAN LITTLE, and SAMUEL TAYLOR.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that afterwards, in the term of November, to wit, on the second day of December, in the year 1842, before the honorable Smith Thompson, one of the judges of the circuit court of the United States for the southern district of New York, at the city hall of the city of New York, the aforesaid issue, so joined between the parties, came on to be tried before a jury of the said southern district, for that purpose duly empannelled, good and lawful men of the said district.

To maintain and prove the said issue on their part, the counsel for the plaintiffs called Thomas J. Gilliland, who, being sworn, testified as follows:

I am a clerk in the office of the collector of the customs of the port of New York—I have brought with me from the custom house, entries made by Taylor, Little & Co., of silk twist, which I now produce.

The witness here produced a number of entries, some of them sworn to by the plaintiff Jonathan Little, and others of them by the plaintiff Samuel Taylor.

The witness further testified:

The paper writing now shown to me I have examined with the said entries, and find the same to correspond with the said entries. The certificate subjoined thereto is subscribed by Edward Curtis, the present collector of the customs for the port of New York, in his proper handwriting.

The said paper was then read to the jury, by the counsel for the plaintiffs, in the words and figures following, viz:

Statement of Silk Twist imported by Taylor, Little & Co.

Date of entry.	Marks and Nos.	Article.	Ships.	Sterling.	Costs.	Duty paid.	When paid.
1834.							1835.
Dec. 9	[H] 619	Silk twist	President -	£89 15 9	$431	$163 78	Mar. 8 & June 8
31	695	Do	Geo. Washington	56	269	102 22	" 26 " 26
1835.							
Jan'y 9	740	Do	Montreal -	100 0 2	480	182 40	Ap. 11, July 11
Feb. 18	821	Do	England -	43 6 3	208	79 04	Cash
Feb. 18	804	Do	Britannia -	57 7 8	275	104 50	May 13, Aug. 13
April 7	887 888 892	Do	Caledonia -	230 3 10	1,105	419 90	July 6, Oct. 6
7	906	Do	Roscoe - -	76 7 9	367	139 46	" 6, " 6
16	939 940	Do	Europe - -	142 13 9	685	260 30	" 13, " 13
17	922	Do	Hibernia -	76 7 6	367	139 46	" 15, " 15
May 11	960	Do	United States -	78 11 6	377	143 26	Aug. 8, Nov. 8
26	864	Do	Silas Richards -	83 17 3	403	153 16	" 25, " 25
							1836.
July 23	[T L] 160	Do	President -	95 13 6	459	174 42	Oct. 17, Jan. 19
25	197	Do	Caledonia -	95	456	173 28	" 21, " 21
1836.							1836.
Jan. 5	470	Do	St. James -	95 1 3	456	173 28	Mar. 8, June 8
"	[T] P 147 148	Do	Do. -	190 16 0	916	348 08	" 8, " 8
21	160 182						
	183 190.	Do	Montreal -	342 7 6	1,643	591 48	Apl. 18, July 18
21	[T L] 497 498						
	518 519 529						
	a 531	Do	Do -	594 18 0	2,856	1,028 16	" 18, " 18

1836.									1836.
Feb. 18	[T] P 206	Silk twist	Columbia -	£89 12 7	430	154 80	May 16, Aug. 16
March 9	[T L] 645	Do	Choctaw -	107 15 3	517	186 12	" 28, " 28
18	[T] P 249	Do	Philadelphia -	122 7 0	587	211 32	" 28, " 28
April 28	[T L] 780	Do	Westminster -	36 12 3	176	63 36	Cash
May 31	[T] P 282	Do	England -	71 3 6	342	123 12	Aug. 30, Nov. 30
June 15	" 337	Do	President -	84 4 0	404	145 44	Sep. 10, Dec. 10
15	[T L] 957	Do	Do -	72 0 0	346	124 56	" 10, " 10
24	[B] 124 125	Do	Samson - -	204 10 6	982	353 52	" 20, " 20
July 18	" 170 171						1837.
	172 173 174	Do	Toronto - -	404	1,939	698 06	Oct. 14, Jan. 14
"	[T] P 454 457						
	471 *a* 482	Do	Do - -	479 10 8	2,302	828 70	" 14, " 14
25	" 515	Do	Ontario - -	74 13 6	717	258 12	" 18, " 18
"	[B] 256	Do	Do - -	74 13 6			
Aug. 9	" 365 366	Do	St. James -	192 17 5	926	333 36	Nov. 6, Feb. 6
"	" 342 343	Do	Westminster -	203 10	977	351 72	" 3, " 3
"	[T] P 546	Do	Do -	73 17 2	354	127 44	" 3, " 3
19	" 557	Do	Ocmulgee -	96 7 11	458	164 88	" 18, " 18
1837.							1837.
Jan. 25	" 593 594	Do	Quebec - -	203 18 8	979	352 44	Apl. 23, July 23
"	[B] 435 436	Do	Do - -	203 18 8	979	352 44	" 23, " 23
31	" 486 487	Do	Hannibal -	205 13 2	987	528 12	" 30, " 30
"	[T] P 620	Do	Do -	99 17 4	479		
"	[H] 488 489						
	507	Do	Philadelphia -	300 11 5	1,442	519 12	" 30, " 30
						10,252 78	

At the request of B. F. Cutting, esq., attorney of Taylor, Little & Co., I state, that upon an examination of the original entries of Taylor, Little & Co., of silk twist, it is found that the entries, vessels, dates of entries, sterling cost, duties, and times of payment, are correctly stated in the foregoing list, and that the aggregate sum paid by T., L. & Co., upon those entries of silk twist, for duties, is $10,252 $\frac{78}{100}$.

EDWARD CURTIS, *Collector.*

COLLECTOR'S OFFICE, *July* 7, 1842.

The counsel for the plaintiffs, further to maintain the said issue, then called David S. Lyon, who being duly sworn testified: I was one of the deputy collectors of the port of New York from the year 1829, inclusive, to the year 1838. During the year 1834, 1835, 1836, and 1837, the plaintiffs imported in this port numerous invoices of silk twist, which they entered at the custom house for this district. The sample now shown to me is similar to the article that I refer to as "silk twist;" duties were charged by the collector thereon, the same as on sewing silk. This charge was not acquiesced in by the plaintiffs. Two of the members of the firm, Mr. Little and Mr. Knowles Taylor, objected to me against the charge of duties. They claimed that silk twist was exempt from duty. Knowles Taylor saw the collector personally respecting one of the entries. The objection was repeatedly made to me by the plaintiffs. The defendant was collector during those years. He was in the habit of consulting with me about the question that arose at the custom house. I have no doubt that I had conversations with defendant about the objections to the payment of duties on sewing silk. He was aware that the parties objected to the payment of this duty. No doubt it was understood by him that these duties would be claimed. When objections were made to me, as deputy collector, it was my practice to report to the collector objections made to me in the course of my official duties. I believe that the entries of silk twist, made by the plaintiffs, were kept separate from the other entries, but have no particular recollection on the subject.

Being cross examined, says: I cannot say that the sample of silk twist shown to me, on the direct, is similar to that imported by the plaintiffs. I cannot say at what time the plaintiffs first objected. They did object from 1834 to 1837. I cannot say whether they objected on the importation by the ship President, nor can I specify any particular entry. The objections were made by them at the first entry. The objections to pay duty on the article were almost daily made by merchants. The goods must have been examined by the government appraisers. In all cases, silk twist was sent to the appraisers for their report, because it was a disputed article.

Being further examined on the direct, says: The appraisers examined all the silk twist imported by the plaintiffs. There was no instance where they reported that the article examined differed from what it purported to be in the entry and invoice.

The counsel for the plaintiffs, further to maintain the said issue on their part, called James Campbell, who being sworn, testified: I was deputy collector of the customs for the port of New York, from the year 1834 inclusive, to the year 1838, during the administration of the defendant. I recollect that the plaintiffs made entries before me of silk twist imported by them. I had frequent conversations with the plaintiffs on the subject of the duties. They claimed that the article was free; there was no protest—don't recollect any thing said as to recovery of duties back; but I understood from them, that they meant to claim the duties back. All the importers of silk twist objected to the payment of duties. I had no conversation with the defendant on the subject, but I had with Mr. Lyon, the deputy collector. My understanding was, that the plaintiffs objected to the payment of duties.

Being cross examined, says: I cannot say that the defendant knew of the plaintiffs' objections, because I did not converse with him upon the subject.

The counsel for the plaintiffs, further to maintain the issue on their part, called Jacob C. Delmar, who being sworn, testified: I am employed in the custom house of this port. I have the charge of the books and papers not in actual use. I am the keeper of the archives. I have been in this office from the year 1834 inclusive, till the present time. I had orders to get up the entries of silk twist made by the plaintiffs. I was ordered to keep them separate and apart, because they would be wanted for some specific purpose. This was before the great fire. (It was admitted, that the great fire occurred in December, 1835.) These entries were kept apart by me, in consequence of this order. I kept apart other entries of other goods, such as kid gloves and other articles, about which there was a dispute, as to whether they were dutiable or not. The entries of silk twist made by S. F. & S. Dorr & Co., were also kept apart, and those of other houses that I do not now recollect. When the defendant went to Europe, I put the entries back on file, waiting for the orders of the new collector. I had a general order when duties were disputed, to keep the entries relating thereto separate and apart. This was a general order. Under that order, I kept the plaintiffs' entries apart.

Being cross examined, says: I do not remember from whom I received the order. It was either from the collector, or Mr. Lyon, the deputy collector, or from the First Auditor, Mr. Schultz. I received my orders sometimes from one, sometimes from the other of them. I think, in this case, I received my orders from Mr. Schultz. I remember after I got up the entries, I asked Mr. Schultz what the object was, as the entries related to many different articles. He said that the duties on the silk twist were in dispute. This was in the year 1834, I think.

The counsel for the plaintiffs, further to maintain the said issue, then called Abraham B. Mead, who being sworn, testified: I was

one of the appraisers of the New York custom house, from 1830 to 1841. The silk twist imported, was sent to the appraiser's office for examination and appraisement. This article was imported by the dealers in cloth, such as Mortimer, Brown & Jones, Cleveland & Lewis, and others. The importers generally objected to the payment of duties on it. They did not conceive it to be sewing silk. The government classed it under the denomination of sewing silk. The silk twist of plaintiffs always corresponded with the entries and invoices.

Being cross examined, says: I did not examine all the silk twist; some of the importations were examined by the other appraisers. All the plaintiffs' twist corresponded with the entries as far as I examined them. I never heard of any instance of a variance.

The counsel for the plaintiffs, further to maintain the said issue on their part, called Henry Hills Taylor, who being sworn, testified: I was a clerk of plaintiffs from October, 1833, to June, 1838. Mr. Little generally swore to the entries at the custom house. I always accompanied him, and used to make out the entries and pass them, and attended to passing the goods at the public store. The silk twist in every instance corresponded with the invoices and entries. The payment of duties was objected to verbally by Mr. Little, and once by Mr. Knowles Taylor. They insisted that the goods were free, and that they should not be charged with duty. These objections were made at the entry of every invoice. The plaintiffs never imported sewing silks from England. The silk twist was imported from London. It was the uniform practice to protest upon every entry. The sample now shown to me appears to be the same article that plaintiffs imported as silk twist. I used to see the cases opened. This article was known in trade as silk twist. It was never called sewing silk. If a buyer had asked for sewing silk, he would never have been shown silk twist. Plaintiffs had a branch of their house in Philadelphia. They used to send a portion of the silk twist there for sale. Mr. Petrie and Charles G. Taylor had charge of that branch establishment. The plaintiffs sold the silk twist. They sold it as silk twist. I have since been in business under the firm of Wiley & Taylor. I went into business on the first of June, 1838. My firm imported silk twist. It was entered at the New York custom house as silk twist, and I paid a duty on it of forty per cent. The duties so paid have been refunded by the government.

Being cross examined, says: The duties were refunded in 1838 and 1839, and I protested, sometimes in writing, sometimes verbally. I do not know that all the duties have been refunded—I believe not those where the protest was verbal. I had repeated conversations with Mr. Lyon about the payment of duties on the plaintiffs' goods. I also conversed with Mr. Campbell, the deputy collector, but he referred me to Mr. Lyon. I generally carried the money to pay the duties on plaintiffs' goods. I always was present

when the duty bonds were paid in cases where bonds had been given. I forget whether the bonds were paid at the bank or not. In the fall of 1835, Knowles Taylor protested to the collector; before then, the protests were made to Mr. Lyon. The plaintiffs have failed in business. I am not a creditor of theirs.

The counsel for the plaintiffs, further to maintain the said issue on their part, called Charles G. Taylor, who testified: I was a clerk of Taylor, Little & Co., the plaintiffs, from the latter part of 1834 to the end of 1837. I resided most of that time in Philadelphia, and had charge of the plaintiffs' branch establishment there with Mr. Petrie. We received from the plaintiffs a large quantity of silk twist for sale. A greater part of the cases marked [T]P was sent to Philadelphia. I sold perhaps eighteen or twenty cases of it. The article was similar to the sample now shown to me. We sold it as silk twist—never as sewing silk. By merchants this article would never be called sewing silk. If a buyer had asked for sewing silk, I would never have shown him twist; it is only known by the name of twist; it is not used for the same purposes as sewing silk. Silk twist cannot be used to sew with; it is used for making button holes, and is generally sold to the tailors. Since 1837 I have imported silk twist. I entered it at the custom house, and paid a duty of forty per cent. I protested against it, and the duties have been refunded to me. The sample now shown to me is a fair sample of the twist imported by the plaintiffs.

Being cross examined, says: I believe that twist is only used for making button holes, but am not positive.

The counsel for the plaintiffs then called Samuel F. Dorr, who, being sworn, testified: I was one of the firm of S. & F. Dorr & Co. from 1834 to 1839. We imported silk twist extensively. We entered them at the custom house. Duties were charged thereon; they were charged forty per cent., as being sewing silks. We paid the duties under protest to the collector. The protests were verbal. Written protests were not then required at the custom house. The duties paid by us have since been nearly all refunded, including the verbal as well as the written protests. We sued the collector and recovered. The question involved was, whether silk twist was sewing silk. We brought two or three suits. The Government has refunded without suit, when there were written protests. The sample now shown to me I call silk twist. Silk twist is manufactured differently from sewing silk. Silk twist is doubled and twisted; the other is a single twist. The twist runs in an opposite way from sewing silk. The effect is, that twist cannot be used to sew with. The uses to which the articles are applied are different; they are known among merchants as two different and distinct articles.

Being cross examined, says: I have imported silk twist from 1834 to the present time.

The counsel for the plaintiffs then called Deforest Manice, who, being sworn, testified: I was one of the firm of Manice, Gould & Co. from December, 1835, to 1838, when it was dissolved; and be-

fore that firm was established, I was in business many years as a merchant. I have been an importer of silk twist, and also of sewing silks. The two articles are entirely different—as much so as worsted and woollens. They are not adapted to the same uses. I did an extensive business at the custom house of New York from 1832 to 1837.

Being cross examined, says: I should have known of it, if any such rule had been established. I would have known of it, from my extensive business there.

The case was then rested.

The counsel for the defendant then requested his honor the judge to instruct the jury, that, in order to entitle plaintiffs to recover, it was necessary for them to prove that they had given written notice to the defendant of their objections to the payment of duties on the silk twist in question, and that they would require him to refund the same; and that verbal notice thereof was not sufficient to entitle them to maintain this action.

His honor the judge charged the jury, that if, under the evidences, they should find that silk twist did not fall under the denomination of sewing silk, but that it was known in trade and amongst merchants as a distinct and different article, that then duties had been improperly charged thereon. That in order, however, to entitle themselves to maintain this action, it was necessary for the plaintiffs to establish that, before paying the duties on the several invoices of silk twist in question, they had given notice to the collector of their objections that duties were not legally chargeable thereon, and that he would be called upon to refund the sums paid to him. And if this notice was brought home to the collector, it was enough; and whether such notice was brought home to the collector or not, was for the jury to determine, under all the evidence that had been given.

The counsel for the defendant excepted to the charge, because it did not instruct the jury as prayed for by him, viz: that the notice must be in writing.

The jury found a verdict for the plaintiffs.

And inasmuch as the said several matters so produced and given in evidence, and the matters insisted on by the said attorney for the defendant in his behalf, do not appear by the record of the verdict aforesaid, the said attorney for the defendant did then and there propose his aforesaid exceptions to the opinion of the said judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiffs. And thereupon, the said judge, at the request of the said attorney for the defendant, did put his seal to this bill of exceptions, pursuant to the statute in such case made and provided, on the seventeenth day of December, in the year of our Lord one thousand eight hundred and forty-two.

SMITH THOMPSON. [L. S.]

Filed 4th January, 1843.